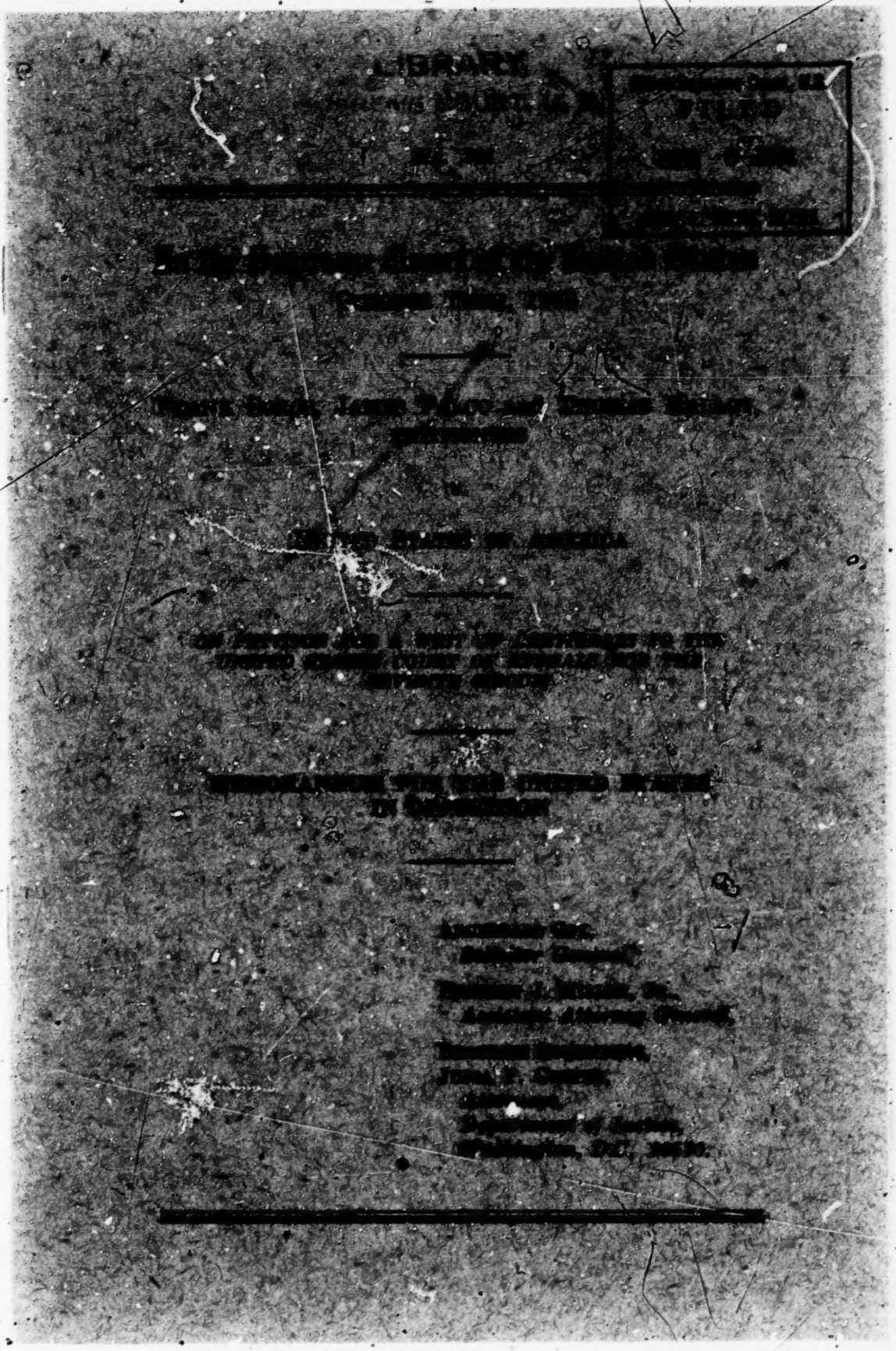

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 764

FRANK SORCE, JAMES FALCO and THOMAS MALONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 1, 1963. A petition for rehearing was denied on December 9, 1963. The petition for a writ of certiorari, which was not filed until January 15, 1964, is therefore out of time.

In any event, as appears from the opinion of the court of appeals (Pet. App. A, 1a-5a), the petition presents no issue worthy of review.

After waiver of a trial by jury, petitioners were convicted by the United States District Court for the Northern District of Illinois of unlawful possession of seven camping tents stolen from an interstate shipment, with knowledge that the tents had been stolen, in violation of 18 U.S.C. 659 (App. 3, 42-45). Each petitioner was sentenced to imprisonment for two years (App. 42-45).

1. On April 20, 1962, a trailer loaded with freight shipped from Missouri and bound for New York was stolen in Chicago. It was found on April 23 with most of the freight missing (App. 6-7). F.B.I. Agent Higgs was advised by other agents of the theft and the contents of the trailer—merchandise consigned by the Hawthorne Finishing Company in New Haven, Missouri to Sears Roebuck in Buffalo, New York. The shipment included J. C. Higgins camping tents (App. 29-30).

On May 8, 1962 at 12:40 p.m. Agent Higgs and another saw an old model Chevrolet truck backed up to the open door of a building at the Blue Top Turkey Farm near Addison, Illinois.[1] The petitioners Malloy and Falco were loading cardboard cartons on the truck. When the truck left an hour later Falco was driving (App. 20). Following the truck in a late model Pontiac were Sorce and Malloy. The two vehicles traveled to the Ten Acre Garden Center near Itasca, Illinois (App. 25), an open air market or nursery displaying plants, trees and shrubs (App. 21).

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[1] Another agent had told Higgs that a Chevrolet truck and Pontiac automobile had left the turkey farm on May 6 and gone to the garden center (App. 30, 38).

Agent Higgs and several other agents drove past the Center four or five times and saw all three petitioners unloading cartons from the truck, stripping the cartons from merchandise and burning the cartons. Some of the merchandise was on the ground and Malloy was putting some in a shed. (App. 20-21). The agents pulled into the Center. Agent Higgs walked through the display section toward the truck and the point where he had seen merchandise on the ground. He was met by Sorce who told him, in answer to his inquiry, that tomato plants were in the front of the lot. Stepping behind Sorce, the agent saw "clearly visible" cartons addressed to Sears Roebuck and Company, Buffalo, New York from the Hawthorne Finishing Company and the labels "J. C. Higgins Camp Tents". The agent asked Sorce if he owned a Sears Roebuck store and Sorce answered that he did not. The agent asked to whom the merchandise on the ground and truck belonged and Sorce answered that it was his. At this point Sorce, Falco (who had jumped down from the truck) and Malloy (who was emerging from the shed) were arrested (App. 21-22, 23). Exhibits 1-7 introduced in evidence were cartons found on the ground and one from the truck (App. 21-22).

These facts show that the stolen merchandise was properly seized as incident to an arrest on probable cause. The agent, who had precise information as to the nature of the stolen shipments, observed at the garden center that the cartons, similar to those which petitioners had been stripping and burning, carried labels showing that they were the same as the missing

merchandise, with the same shipper and addressee. These facts distinguish this case from *Henry* v. *United States*, 361 U.S. 98, where certain cartons seized from an automobile were not identified as stolen property until after the arrest.

Petitioners' contention that the arrest was incident to a search is based upon the fallacious assumption (and consequent improper reliance upon cases involving entry into homes) that the entry of the officers onto the premises of the garden center was illegal. The entry of the officers into this "open air nursery" to which the public was invited was not a trespass.

2. At the time of the arrest Sorce said he had purchased the merchandise but he could not identify the seller. Falco said that he had been asked to back the truck up from the front of the lot to the rear and that he was merely helping to unload it (App. 24). Malloy said that he had hitch-hiked to the Garden Center, that the truck had arrived subsequent to his arrival, and that he had been told by Sorce to unload it (App. 25). Later at the F.B.I. office Malloy said that Falco had told him he might have work for him at the Garden Center, that he [Malloy] had reported for work there on the morning of May 8, 1962 at 8:30, and had remained there throughout the morning. He said the truck loaded with boxes came in the early part of the afternoon and that he had been instructed to help unload it. He said he had not been at the Blue Top Turkey Farm (App. 26-27).

The challenge to the sufficiency of the evidence to show knowing possession of stolen property is without merit. All three petitioners were adequately con-

nected with the loading at the turkey farm of the truck from which the cartons in evidence came and the removal of cartons from the truck. Some asserted ownership of the stolen merchandise. These facts coupled with the false exculpatory statements made by Falco and Malloy were clearly sufficient to show guilty knowledge as to all.

3. The claim that the trial court committed reversible error during the testimony of the arresting officer on the motion to suppress is without merit.

The motion to suppress was heard after the government's case in chief. (App. 1). Agent Higgs testified that Agent Thompson had described to him the contents of the stolen trailer and had showed him bills of lading (App. 29-30). When defense counsel asked Thompson if he had the documents, Thompson said they were photostats and were in his office and that the originals were in the United States Attorney's office. In answer to a question by government counsel whether they were "identical to these particular bills of lading which are here" Thompson said they were. (App. 30-31). The court directed defense counsel to cross-examine Higgs, pointing out that no notice to produce had been filed (App. 32). Thereafter Higgs testified that he did not examine the documents in any detail, but relied on Thompson's statements that they were Sears Roebuck articles (App. 32). The entire incident is obviously of no importance.

The witness testified for the government as to the facts and circumstances upon which he acted in arresting petitioners on May 8th and as to observations by

other officers on May 6th. The court did not abuse its discretion in refusing to permit cross-examination as to what Higgs did in relation to the turkey farm on April 25th (App. 33-36). Higgs did testify that he had "never been on the premises of the Blue Top Turkey Farm building" (App. 36). If petitioners wished to make any point based on visits to the turkey farm before May 6th, they had the right to introduce direct evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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